

**WAUKESHA COUNTY BOARD OF ADJUSTMENT
SUMMARY OF MEETING**

The following is a Summary of the Board of Adjustment Meeting held on Wednesday, December 9, 2009, at 6:30 p.m. in Room AC 255/259 of the Waukesha County Administration Center, 515 W. Moreland Blvd., Waukesha County, Wisconsin, 53188.

BOARD MEMBERS PRESENT: Ray Dwyer
Robert Bartholomew
Walter Schmidt
Nancy Bonniwell

BOARD MEMBERS ABSENT: Tom Day

SECRETARY TO THE BOARD: Nancy M. Bonniwell

OTHERS PRESENT: Sheri Lieffring, Senior Land Use Specialist
Joe Johnson, BA09:045, builder/petitioner
Mark Williamson, BA09:046, builder
John & Jeri Gamache, BA09:047, owners

The following is a record of the motions and decisions made by the Board of Adjustment. Detailed minutes of these proceedings are not produced, however, a taped record of the meeting is kept on file in the office of the Waukesha County Department of Parks and Land Use and a taped copy is available, at cost, upon request.

SUMMARIES OF PREVIOUS MEETINGS:

Mr. Bartholomew *I make a motion to approve the Summary of the Meeting of November 11, 2009.*

The motion was seconded by Mr. Dwyer and carried unanimously.

NEW BUSINESS:

BA09:045 MARK AND KATHLEEN REDMOND TRUST (OWNER) OLD WORLD CRAFTSMEN (AGENT):

Mr. Schmidt *I make a motion to approve the requested variances from the remodeling a non-conforming structure in excess of 50% of its fair market value requirements, shore setback requirements, and the C-1 (EFD) District regulations to allow extensive remodeling and updating of the boathouse and construction of retaining walls adjacent to the boathouse, subject to the following conditions:*

1. *No increase in the existing footprint or floor area of the boathouse is permitted. The roof overhangs may not exceed two feet in width.*
2. *The boathouse shall conform to the height requirements of the Ordinance not to exceed 15 ft. total height.*
3. *The boathouse shall be remodeled substantially in compliance with the plans submitted to Waukesha County on November 13, 2009. If any changes are made to the plans submitted with this application, the revised plans must be submitted to the Planning and Zoning Division staff prior to the issuance of a Zoning Permit. The Planning and Zoning Division staff shall ensure that the proposed plans are substantially in compliance with the plans submitted with this application.*
4. *The boathouse may not be used for human occupancy or habitation. A boathouse may contain limited plumbing facilities for occasional use and convenience of the occupants of the lot such as having a toilet facility or shower facility convenient for users of the lakefront, but under no circumstances may the boathouse be used for human habitation. Human habitation is defined as utilizing the building for occupancy for overnight living or longer periods of time and including the aggregate of normal living activities such as lounging, cooking, eating, sleeping, etc.*
5. *Prior to the issuance of a Zoning Permit, an updated Plat of Survey, Site Plan, or Landscape Plan showing the location, size and height of the proposed retaining walls, the location of the proposed path, and a vegetative plan, must be prepared by a registered land surveyor or landscape architect and submitted to the Planning and Zoning Division staff for review and approval.*
6. *No individual retaining wall is to exceed 4 ft. in height. The retaining walls are not to be any closer than the existing retaining walls as shown on the submitted Plat of Survey done by Kevin A. Slottke, R.L.S. dated January 17, 2007.*

The reasons for this decision are as follows: The approval of the request for a variance from the remodeling a non-conforming structure in excess of 50% of its fair market value and from the C-1 (EFD) District regulations with the

required conditions will allow the petitioner to be able to bring the boathouse up to code, remodel the interior of the boathouse and construct a new roof without any expansion of the footprint. The foundation is substantial and in good shape. It would be an unnecessary hardship not to allow this building to be updated and maintained as it has been there for over 40 years. Furthermore, the change in the floodplain mapping which recently placed this structure within the mapped floodplain is not a self-created situation. The repairs and modernization are primarily for safety and aesthetics for the Lake and adjacent landowners. There will be no type of human habitation in this building so flooding is not an issue. It is not reasonable or feasible to require flood proofing of an existing boathouse. Elevating the structure on fill would have a negative impact on the lake due to the grading and land disturbance this would create on the shoreline. Furthermore, there is a pending study being reviewed by FEMA that, if approved, will lower the floodplain elevation of Lower Nemahbin Lake. When this occurs, the boathouse and retaining walls will be outside of the mapped floodplain again. The proposed remodeling and repairs will result in no overall increase in the square footage on the property. The retaining walls are necessary in order to allow access to the service door. This work should not adversely affect the public health and welfare. Therefore, the Board feels that the boathouse is a substantial structure and should be allowed to be remodeled and repaired as proposed. Therefore, the approval of this request is within the purpose and intent of the Ordinance.

The motion was seconded by Mr. Bartholomew and carried unanimously.

In the event that the floodplain mapping is not amended, the Planning and Zoning Division staff's recommendation was for **denial** of the requested variances from the remodeling a non-conforming structure in excess of 50% of its fair market value and shore setback requirements and the C-1 (EFD) District regulations to allow extensive remodeling and updating of the boathouse and construction of retaining walls adjacent to the boathouse.

The reasons for the recommendation, as stated in the Staff Report, are as follows:

The applicant has failed to demonstrate, as required for a variance, that denial of the requested variances would result in an unnecessary hardship. A hardship has been defined by the Wisconsin Supreme Court as a situation where compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily

burdensome. There is no justifiable reason for granting a variance that allows an accessory structure, such as a boathouse, to be remodeled/rebuilt in the floodplain. The intent of the C-1 (EFD) District provisions is to regulate and diminish the proliferation of non-conforming structures and uses in floodplain areas and to regulate said reconstruction, remodeling, conversion and repair with the overall intent of lessening the public responsibilities attendant to the continued and expanded development of land and structures which are inherently incompatible with natural floodplains and to lessen the potential danger to life, safety, health and welfare of persons whose lands are subject to the hazards of floods.

In the event that the floodplain mapping is amended, the Planning and Zoning Division staff's recommendation was for **approval** of the requested variance from the remodeling a non-conforming structure in excess of 50% of its fair market value requirements and the shore setback requirements to allow extensive remodeling and updating of the boathouse and construction of retaining walls adjacent to the boathouse, subject to the following conditions:

1. increase in the existing footprint or floor area of the boathouse is permitted. The roof overhangs may not exceed two feet in width.
2. The boathouse shall conform to the height requirements of the Ordinance not to exceed 15 ft. total height.
3. The boathouse shall be remodeled substantially in compliance with the plans submitted to Waukesha County on November 13, 2009. If any changes are made to the plans submitted with this application, the revised plans must be submitted to the Planning and Zoning Division staff prior to the issuance of a Zoning Permit. The Planning and Zoning Division staff shall ensure that the proposed plans are substantially in compliance with the plans submitted with this application.
4. The boathouse may not be used for human occupancy or habitation. A boathouse may contain limited plumbing facilities for occasional use and convenience of the occupants of the lot such as having a toilet facility or shower facility convenient for users of the lakefront, but under no circumstances may the boathouse be used for human habitation. Human habitation is defined as utilizing the building for occupancy for overnight living or longer periods of time and including the aggregate of normal living activities such as lounging, cooking, eating, sleeping, etc.
5. Prior to the issuance of a Zoning Permit, an updated Plat of Survey showing the location of the revised floodplain elevation as approved by FEMA, must be prepared by a registered land surveyor and submitted to the Planning and Zoning Division staff for review and approval.

The reasons for the recommendation, as stated in the Staff Report, are as follows:

The approval of the request for a variance from the remodeling a non-conforming structure based upon the revised and approved Floodplain mapping in excess of 50% of its fair market value will allow the petitioner to be able to bring the boathouse up to code and remodel the interior of the boathouse. The foundation is substantial and in good shape. The proposed remodeling and repairs will result in no overall increase in the square footage on the property. The retaining walls are necessary in order to allow access to the service door. This work should not adversely affect the public health and welfare. Therefore, the staff feels that the boathouse is a substantial structure and should be allowed to be remodeled and repaired as proposed as long as the boathouse is not located within the floodplain of the lake. Therefore, the approval of this request would be within the purpose and intent of the Ordinance.

BA09:046 JOHN AND CHRISTINE LESKO TRUST:

Mr. Bartholomew

*I make a motion to **approve** the request for an after-the-fact variance from the floor area ratio requirements to allow the 997 sq. ft. of illegally converted attic space on the second floor to remain as is, **approve** the requested variance from the remodeling a non-conforming structure in excess of 50% of its fair market value requirements to allow interior remodeling of the residence and construction of a pitched roof over the first floor in place of an existing second story deck, **deny** the requested variance from the floor area ratio requirements to allow a new second story addition, and **deny** the requested special exception from the offset requirements in accordance with the Staff's recommendation as stated in the Staff Report, with the conditions stated in the Staff report and for the reasons stated in the Staff Report.*

The motion was seconded by Ms. Bonniwell and carried unanimously.

The Planning and Zoning Division staff's recommendation was for the staff recommends **approval** of the request for a variance from the floor area ratio requirements to allow the 997 sq. ft. of illegally converted attic space on the second floor to remain as is, **approval** of the requested variance from the remodeling a non-conforming structure in excess of 50% of its fair market value requirements to allow interior remodeling of the residence, **denial** of the requested variance from the floor area ratio requirements to allow a new second story addition, and **denial** of the requested special exception from the offset requirements, with the following conditions:

1. No increase in the existing floor area on the property is permitted. No additional square footage may be added to the second floor. No change to the roofline of the second story is permitted.

2. Prior to issuance of a Zoning Permit, a detailed cost estimate must be submitted to the Planning and Zoning Division Staff for review and approval.
3. Prior to issuance of a Zoning Permit, detailed construction plans for the approved work must be submitted to the Planning and Zoning Division Staff for review and approval.
4. Prior to the issuance of a Zoning Permit, an updated Plat of Survey showing the location of all of the structure on the property and the 100-year floodplain, must be prepared by a registered land surveyor and submitted to the Planning and Zoning Division staff for review and approval. The survey should also identify the total lot size.

The reasons for the recommendation, as stated in the Staff Report, are as follows:

The approval of the request for the variances from the remodeling a non-conforming structure in excess of 50% of its fair market value and the floor area ratio requirements will allow the petitioner to remodel the interior of the residence and retain the existing second floor of the residence, including the 997 sq. ft. that was added illegally in the recent past. This will result in no overall increase in the amount of existing square footage on the property. To require that no remodeling or updates occur to the residence because it is non-conforming would be unreasonably burdensome on the property owner; especially since previous variances have already allowed significant expansion and remodeling on this structure.

The applicant has failed to demonstrate, as required for a variance, that denial of the requested variance from the floor area ratio requirements to allow an additional second floor addition would result in an unnecessary hardship. A hardship has been defined by the Wisconsin Supreme Court as a situation where compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. The property is currently being used for residential purposes. Furthermore, a previous owner was granted variances in 1997 to significantly expand and remodel the residence that previously existed on the property. The Board, at the time, stated that the approval of the variances would result in a reasonable use of the non-conforming lot. The variances allowed a residence with 1,964 sq. ft. on the first floor, 514 sq. ft. on the second floor and a 456 sq. ft. attached garage. However, since then, that previous owner apparently added an additional 997 sq. ft. to the second floor without permits or approvals; therefore, the new owner already enjoys more than just a reasonable use of the structure and no additional square footage is justifiable. It is not necessary to have over 4,000 sq. ft. of living and storage space on a property that is only 9,239 sq. ft. in size in order to have a reasonable use of the property. Case law has repeatedly upheld that owners are not entitled to the “highest and best use”, but only a reasonable use of a property when variances are required. The owners are asking to continue to expand a structure that already has a floor area ratio that is more than double what the zoning district allows. This is simply not a reasonable request. In 1997, the Board approved a floor area ratio of 31.7% (2,934 sq. ft.). The current floor area ratio is 43% (3,931 sq. ft.). The allowable floor area ratio in this zoning district is 19.5% (1,802 sq. ft.). The existing floor area is already way out of line with what would normally be approved by the Board on a lot of this size. In addition,

even though the second floor addition will be located no closer to the side lot lines than the existing residence, it will significantly increase the bulk and height of the residence that is already located too close to the side lot lines, the road, and potentially the floodplain. Most importantly, the property is already being used for a permitted purpose and the denial of the requested variance and special exception would not be unnecessarily burdensome on the property owner. Allowing continued expansion of this structure does not meet any of the legal tests for granting of a variance and is not within the purpose and intent of the Ordinance or the Board's previous decisions on this property.

However, the Staff feels that the residence should be allowed to be remodeled with no increase in the total floor area on the property. Therefore, the conditional approval of the overall request would be within the purpose and intent of the Ordinance.

BA09:047 JOHN GAMACHE:

Mr. Bartholomew

*I make a motion to **approve** the requested variances from the floor area ratio and open space requirements, and **deny** the requested variance from the offset requirements of the Waukesha County Shoreland and Floodland Protection Ordinance, to permit the removal of the existing residence and construction of a new two-story single-family residence with attached garage on the property, with the following changes to the conditions:*

Condition No. 3 shall be amended to read: "The total floor area of the residence and attached garage, not including the exposed basement, must not exceed 17.5% of the lot area. Based on a lot area shown on the submitted Site Plan, this would result in a floor area of approximately 2,415 sq. ft. Please note that the intent is to grant a 17.5 % floor area ratio even if the lot size is found to be different based on the approved Certified Survey Map."

Condition No. 4 shall be amended to read: "The total footprint of the structure, including the attached garage, is not to exceed 1,680 sq. ft. This will result in approximately 12,120 sq. ft. of open space."

A condition shall be added to read: "The total height of the structure is not to exceed 33 ft., as measured from the existing elevation at the edge of the private road easement to the peak of the roof."

The reasons for this decision are as follows: The conditional approval of this request, with the recommended conditions, will permit a reasonable use of the property. A variance requires a demonstration that a denial of the variance would result in an unnecessary hardship. A hardship has been defined by the Wisconsin Supreme Court as a situation where compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or

density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. It has not been demonstrated that denial of the requested offset variance would result in an unnecessary hardship. Variances should only be granted to accommodate physical limitations on a property that prevent a reasonable use of the property; not to accommodate the personal preferences or needs of the current property owner. The offset variance is not justifiable as the need for this variance is eliminated if the lots are legally combined as conditioned. It is not necessary to have over 2,800 sq. ft. of living and storage space (not including a basement level) to provide a reasonable use of this non-conforming property. Further, strict adherence to the district regulations does not prevent a reasonable use of the property. Case law has repeatedly held that petitioners are not entitled to the “highest and best use” of a property, but only reasonable use. The house and attached garage can be easily redesigned to accommodate the approved 2,415 sq. ft. of living and storage space, which provides a reasonable use of this property and is not unnecessarily burdensome. Further, there are no unique property features to justify granting of the requested variances for the proposed structures. It is necessary to consider the cumulative effects of granting similar requests; with this in mind, allowing a structure as large as requested on a lot of this size would be detrimental to the surrounding properties and to the natural resources in the area. Although this property consists of three lots, it is felt that the proposed residence is much too large for the still relatively small parcel and would not be in keeping with other development in the area. The layout of Lower Clark’s Park is not a typical subdivision layout and the area already looks very overcrowded. The open space variance is justified, as the lot is not big enough to accommodate the open space requirements; however, it is possible to reduce the footprint from its proposed size and be more conforming to the district requirements. Therefore, based on all preceding information, the conditional approval and partial denial of this request is in conformance with the purpose and intent of the Ordinance.

The motion was seconded by Mr. Schmidt and carried unanimously.

The Planning and Zoning Division staff’s recommendation was for **approval** of the requested variance from the open space requirements and **denial** of the requested variances from the floor area ratio and offset requirements of the Waukesha County Shoreland and Floodland Protection Ordinance, to permit the removal of the existing residence and construction of a new two-story single family residence with attached garage on the property, subject to the following conditions:

1. A Certified Survey Map combining the three legal lots of record into one lot must be prepared by a registered land surveyor and submitted to the Town of Eagle and the Waukesha County Planning and Zoning Division staff for review and approval. The Certified Survey Map must be recorded in the Waukesha County Register of Deed's office, prior to the issuance of a zoning permit for the new residence.
2. The proposed residence and attached garage must meet all locational requirements of the Ordinance.
3. The total floor area of the residence and attached garage, not including the exposed basement, must not exceed 15.5% of the lot area. Based on a lot area shown on the submitted Site Plan, this would result in a floor area of 2,141 sq. ft.
4. The total footprint of the structure, including the attached garage, is not to exceed 1,400 sq. ft. This will result in approximately 12,400 sq. ft. of open space.
5. There must be a garage constructed and it must be at least 400 sq. ft. in size.
6. Prior to issuance of a Zoning Permit, a soil boring must be done at the house site to determine if the site is appropriate for basement construction, and if so, what elevation the basement floor must be placed at. The basement floor must be placed at least one foot above the estimated seasonal high groundwater table. Depending on the soil conditions, it may be required that a Professional Engineer design the basement.
7. Prior to the issuance of a Zoning Permit, a Plat of Survey showing the staked-out location of the proposed residence and attached garage, as well as all proposed decks, patios, and retaining or decorative walls, in conformance with the above conditions, must be prepared by a registered land surveyor and submitted to the Planning and Zoning Division staff for review and approval.
8. Prior to the issuance of a Zoning Permit, a complete set of house plans, in conformance with the above conditions, must be submitted to the Planning and Zoning Division staff for review and approval.
9. In order to ensure the construction of a new residence does not result in adverse drainage onto adjacent properties, a detailed Grading and Drainage Plan, showing existing and proposed grades, and the location of all proposed retaining walls, must be prepared by a registered landscape architect, surveyor, or engineer and submitted to the Planning and Zoning Division staff for review and approval, prior to the issuance of a Zoning Permit. The intent is that the property be graded according to the approved plan, and also to provide that the drainage remain on the property or drain to the lake, and not to the neighboring properties or the road. This grading plan may be combined with the plat of survey required in Condition No. 7.
10. Prior to the issuance of a Zoning Permit, the Environmental Health Division must certify that the existing septic system is adequate for the proposed construction, or a Sanitary Permit for

a new waste disposal system must be issued and a copy furnished to the Planning and Zoning Division staff. **Please note that Environmental Health has issued a PSE Denial based on the submitted plans.**

The reasons for the recommendation, as stated in the Staff Report, are as follows:

The conditional approval of this request, with the recommended conditions, will permit a reasonable use of the property. A variance requires a demonstration that a denial of the variance would result in an unnecessary hardship. A hardship has been defined by the Wisconsin Supreme Court as a situation where compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. It has not been demonstrated that denial of the requested floor area ratio and offset variances would result in an unnecessary hardship. Variances should only be granted to accommodate physical limitations on a property that prevent a reasonable use of the property; not to accommodate the personal preferences or needs of the current property owner. It is not necessary to have over 2,800 sq. ft. of living and storage space (not including a basement level) to provide a reasonable use of this non-conforming property. Further, strict adherence to the district regulations does not prevent a reasonable use of the property. Case law has repeatedly held that petitioners are not entitled to the “highest and best use” of a property, but only reasonable use. The house and attached garage can be redesigned to accommodate a structure containing 2,141 sq. ft. of living and storage space, which provides a reasonable use of this property and is not unnecessarily burdensome. Also this is the square footage that currently exists on the property. Further, there are no unique property features to justify granting of the requested variances for the proposed structures. It is necessary to consider the cumulative effects of granting similar requests; with this in mind, allowing a structure as large as requested on a lot of this size would be detrimental to the surrounding properties and to the natural resources in the area. Although this property consists of three lots, it is felt that the proposed residence is much too large for the still relatively small parcel and would not be in keeping with other development in the area. The layout of Lower Clark’s Park is not a typical subdivision layout and the area already looks very overcrowded. The offset variance is not justifiable as the need for this variance is eliminated if the lots are legally combined as conditioned. The open space variance is justified as the lot is not big enough to accommodate the open space requirements; however, it is possible to reduce the footprint from its proposed size and be more conforming to the district requirements. Therefore, based on all preceding information, the conditional approval and partial denial of this request is in conformance with the purpose and intent of the Ordinance.

OTHER ITEMS REQUIRING BOARD ACTION:

None.

ADJOURNMENT:

Mr. Bartholomew *I make a motion to adjourn this meeting at 9:05 p.m.*

The motion was seconded by Mr. Schmidt and carried unanimously.

Respectfully submitted,

Nancy M. Bonniwell

Secretary, Board of Adjustment